Supreme Court, U.S.
FILED
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No. 90-1762

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VIDA WILLIAMS,

Petitioner,

vs.

GARBAN LTD.; GARVIN BANTEL CORP.; and GARVIN GUYBUTLER, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Second Circuit is correct in holding that "intent" to discriminate on account of age is an element of proof in an age-related discriminatory discharge.

Whether the United States Court of Appeals for the Second Circuit is correct in holding that proof of discriminatory intent is an essential element of proof in establishing a discrimination case on the basis of age.

Whether the United States Court of Appeals for the Second Circuit is correct in affirming the United States District Court's [Southern District of New York] holding that an essential element of an age discrimination case is proof by a preponderance of the evidence that the employee was replaced by an individual under the age of forty.

Whether the United States Court of Appeals for the Second Circuit is correct in affirming the United States District Court's holding that an essential element of an age discrimination case is proof of the mitigation of damages.

PARTIES

The Petitioner is Vida Williams.

Respondents are Garban, Ltd., Garvin Bantel Corp. and Garvin Guybutler, Inc.

Garban Ltd. and Garvin Guybutler are wholly owned subsidiaries of Mills & Allen International P.L.C. which has its principal place of business in London, England. Garvin Bantel Corp. was a wholly owned subsidiary of Mills & Allen International P.L.C., and now is dissolved.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Vida Williams, respectfully petitions this Court for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not reported. It is reprinted in the Appendix at A:1.[1]

The opinion of the United States District Court for the Southern District of New York is not reported. It is reprinted in the Appendix at A: 4.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on February 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

FEDERAL STATUTES INVOLVED

THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, 29 U.S.C. 626

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

> (b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion.

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section

---

[1] References to A:____ are to the appendix annexed to this petition.

211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

THE AGE DISCRIMINATION CLAIMS ASSISTANCE ACT OF 1988

An Act to extend the statute of limitations applicable to certain claims under the Age Discrimination in Employment Act of 1967 that were filed with the Equal Employment Opportunity Commission before the date of enactment of this Act.

The Congress finds that –

(1) the Equal Employment Opportunity Commission (thereafter in this Act referred to as the "Commission") has failed to process an undetermined number of charges filed under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621-634) before the running of the statute of limitations applicable to bringing civil actions in the Federal courts under such Act, and

(2) many persons who filed such charges with the Commission have lost the right to bring private civil actions with respect to the unlawful practices alleged in such charges.

Notwithstanding section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)), a civil action may be brought under section 7 of such Act by the Commission or an aggrieved person, during the 540-day period beginning on the date of enactment of this Act if –

(1) with respect to the alleged unlawful practice on which the claim in such civil action is based, a charge was timely filed under such Act with the Commission after December 31, 1983.

(2) the Commission did not, within the applicable period set forth in section 7(e) either –

(A) eliminate such alleged unlawful practice by informal methods of conciliation, conference, and persuasion, or

(B) notify such person, in writing, of the disposition of such charge and of the right of such person to bring a civil action on such claim,

(3) the statute of limitations applicable under such section 7(c) to such claim ran before the date of enactment of this Act, and

(4) a civil action on such claim was not brought by the Commission or such person before the running of the statute of limitations.

STATEMENT OF THE CASE

INTRODUCTION

Petitioner commenced an administrative proceeding before the New York State Division of Human Rights on March 3, 1984. By verified complaint, Respondent, Garban Ltd. was charged with having engaged in unlawful discriminatory practices relating to Petitioner's age and disability in violation of the Human Rights Law of the State of New York. On April 3, 1984, Petitioner authorized the New York State Division of Human Rights to file her verified complaint with the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act. The verified complaint was duly filed on April 5th, 1984.

Under the Age Discrimination Claims Assistance Act of 1988, the time to file a private claim was extended to September 28, 1989, and Petitioner filed her claim pursuant thereto.

FACTS

The Petitioner is an unemployed maintenance worker who was discharged on June 15, 1983 after thirteen years of service for the Respondent companies. The mailgram discharging Petitioner advised that she failed to obtain prior approval from her supervisor to take time off to undergo corrective surgery. At a bench trial before the United States District Court for the

Southern District, it was asserted that Petitioner's poor work performance also was a contributing factor to Respondent's decision to discharge her. The United States District Court specifically disagreed finding that the "true reason" for Petitioner's discharge was her supervisor's "personal dislike" of Petitioner, "and that he took advantage of her medical absence to use it as an excuse for firing her". A: 5.

The District Court determined that Petitioner had cast doubt on Respondents' asserted reasons for discharge but applied a more rigid standard for proving a prima facie case by concluding that Petitioner failed to establish that she was replaced by someone not in the statutes protected class.

REASONS FOR GRANTING THE PETITION

THE DECISION OF THE UNITED STATES COURT OF APPEALS ASSERTS A NEW INTERPRETATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

It is respectfully submitted that the United States Court of Appeals for the Second Circuit erroneously affirmed a more burdensome standard of proving age discrimination by requiring that Petitioner prove the Respondents' "intent" to engage in discriminatory conduct. Neither statutory law nor case law requires Petitioner to plead or prove the aim or state of mind of the employer prior to or at the time of discharge. Proof that the discharge was an act of volition predicated upon a discriminatory intent or purpose is not requisite to establishing a prima facie case.

The United States Court of Appeals for the Second Circuit concluded that Petitioner "simply did not establish that the employer was motivated by an intent to discriminate on account of age." A: 2. The United States Court of Appeals for the Second Circuit concluded that Petitioner failed to establish a prima facie case, and *Ibrahim v. New York State Department of Health*, 904 F.2d 161 (2d cir. 1990) was cited in support of its conclusion.

Petitioner, Williams, conducted a bench trial before the United States District Court for the Southern District of New York. Respondents had previously moved for summary judgment which was denied. Respondents renewed their motion for dismissal at the conclusion of Petitioner's direct case. Again, it was denied. It is respectfully submitted that Petitioner's complaint would have been dismissed had she not established a prima facie case.

In *Ibrahim*, the United States Court of Appeals for the Second Circuit specifically held that once Petitioner establishes a prima facie case, the burden shifts to Respondents to produce a legitimate nondiscriminatory reason for their discharge of Petitioner.

"Effectively discrediting the employer's articulated reason will, therefore, suffice to demonstrate a pretext; the plaintiff need not go further and submit additional evidence indicating age was a factor in the decision at issue." Lit Age Discrim Cases, section 2:05, *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393 (CA3, 1984); *Cuddy v. Carmen*, 694 F.2d 853 (CA DC, 1982); *Mistretta v. Sandia Corp.*, 639 F.2d 588 (CA10, 1980); *Behlar v. Smith*, 719 F.2d 950 (CA8, 1983).

Respondents articulated four reasons for discharge:

a. Petitioner failed to obtain prior approval from her supervisor to undergo corrective surgery;

b. Petitioner's job performance was unsatisfactory;

c. Petitioner was a constant troublemaker; and

d. Petitioner attempted to "poison" the opinion of her coworkers against her supervisor.

> Once the employer satisfies its burden of production the inquiry moves to a new level of specificity, where Petitioner has the burden of persuading the Court that the proffered reason was not the true reason for the

> employment decision. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 1094-95, 67 L.Ed.2d 207 (1981). The Petitioner may carry this burden directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Id at 256, 101 S.Ct. at 1095.

It is respectfully submitted that the findings of the United States District Court for the Southern District of New York were clear and unequivocally rejected. The trial court held that Respondents' asserted reasons were false and:

> I find that the true reason for the discharge was Mr. Troccoli's personal dislike of Mrs. Williams and that he took advantage of her medical absence to use it as an excuse for firing her. I find that her job performance was satisfactory on an objective basis, and the discharge seems to me to have been unfair for at least two reasons;
>
> 1. The Respondents provided no notification at any time that Mrs. Williams was not doing satisfactory work;
>
> 2. After thirteen years of service, it was unreasonable to discharge Mrs. Williams even if she did fail to give notice of her impending absence. A: 5.

It is respectfully submitted that "personal dislike" falls short of a legitimate nondiscriminatory business reason.

Respondents allege that Petitioner was discharged for cause. The trial court rejected the proffered reason and explicitly found that the employer, ". . . took advantage of her medical absence to use it as an excuse for firing her." In rejecting those reasons, the trier of facts tacitly concludes and finds the proffered reasons to be pretextual. If the rejected reasons for discharge are not deemed to be pretextual, then an employers'

discharge for "personal dislike" or any other subjective, unarticulated standard, implicitly becomes a legitimate, non-discriminatory business reason.

In *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 83 (2nd Cir.1990), this Court confirmed ". . . the three-step burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 207 (1981)." Plaintiff may prove a prima facie violation of the ADEA by demonstrating that she is a member of the protected group, that she was discharged from her employment, and her performance was satisfactory. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802. Where there is no dispute regarding plaintiff's qualifications and satisfactory work performance exists, the prima facie case is proved. *McDonnell Douglas v. Green*, 411 U.S. 792,802.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel

FELTON & ASSOCIATES
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May 14, 1991

APPENDIX

DECISION

JDM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February, one thousand nine hundred and ninety-one.

PRESENT: HONORABLE J. DANIEL MAHONEY,
HONORABLE ELLSWORTH A. VANGRAAFEILAND,

Circuit Judges.

HONORABLE REENA RAGGI,*

District Judge.

VIDA WILLIAMS,

Plaintiff-Appellant,

- v. -

GARBAN LTD.; GARVIN BANTEL CORP.; and GARVIN GUYBUTLER, INC., No. 90-7872

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

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* United States District Judge for the Eastern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is AFFIRMED.

1. Plaintiff Vida Williams appeals from a judgment of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge*, entered September 17, 1990 that dismissed, after a nonjury trial, her complaint alleging discriminatory discharge in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634 (1988). Judge Lasker found that the defendant-employer's "true reason for the discharge was Mr. Troccoli's personal dislike of Mrs. Williams," and that Troccoli "took advantage of her medical absence to use it as an excuse for firing her." He concluded, however, that the evidence "simply d[id] not establish that the employer was motivated by an intent to discriminate on account of age."

2. The district court thus found, and we agree, that Williams failed to establish a prima facie case under the ADEA. The district court explicitly concluded that age discrimination did not motivate Williams' discharge, and there was ample support in the record for that ruling. Accordingly, no violation of the ADEA occurred, and Williams is simply incorrect in contending on appeal that the district court "committed reversible error by dismissing the complaint where it determined that plaintiff's discharge was not for a legitimate business reason." In the absence of a prima facie case of age-discriminating discharge, the "legitimacy" of Williams' discharge is simply not in issue under the ADEA. *Cf. Ibrahim v. New York State Dep't of Health*, 904 F.2d 161, 166, 168 (2d Cir. 1990) (where prima facie case established, Title VII plaintiff met ultimate burden of persuasion by clearly demonstrating pretextual nature of defendant's explanations).

3. Williams further contends that she was entitled to a default judgment against Garvin Bantel Corp. because it failed to appear. Fed. R. Civ. P. 55(a) provides:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

Emphasis added. Williams has not pointed to any record evidence to support her claim that a default judgment was warranted. Indeed, she had not addressed defendants' assertion that Garvin Bantel Corp. was dissolved prior to her discharge.

/s/Ellsworth A. VanGraafeiland
Hon. Ellsworth A. VanGraafeiland, U.S.C.J.

/s/J. Daniel Mahoney
Hon. J. Daniel Mahoney, U.S.C.J.

/s/Reena Raggi
Hon. Reena Raggi, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

DECISION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

Vida Williams,

Plaintiff,

v. 89 Civ 6380 MEL

Garban Ltd., et al.,

Defendants.

----------x

September 13, 1990

11:00 a.m.

(Trial resumed)

DECISION OF THE COURT

THE COURT: Good morning, everyone.

MS. FELTON: Good morning.

MR. SULLIVAN: Good morning, your Honor.

THE COURT: I'm about to deliver my verdict in the case which has just been concluded. I will read my findings of fact and conclusions of law into the record.

Plaintiff Vida Williams in this suit seeks recovery for alleged age discrimination which she claims is in violation of 29 USC 621-634. To establish a prima facie case under the statute a plaintiff must establish four elements:

1. That the plaintiff is a member of the statute's protected group, those persons over 40, and there's no dispute that Mrs. Williams was a member of the group;

2. That she was terminated from her employment and there is no dispute about that;

3. That her job performance was satisfactory. There is a dispute about that;

4. That her employer replaced her with someone not in the statute's protected class. There is a dispute about that.

Plaintiff has cast doubt on the defendant's asserted reason for her discharge, namely that she underwent elective surgery without prior approval. Indeed the employer itself alleges that for all practical purposes a major reason for Mrs. Williams' dismissal was Mr. Troccoli's dissatisfaction with her performance.

I find that the true reason for the discharge was Mr. Troccoli's personal dislike of Mrs. Williams and that he took advantage of her medical absence to use it as an excuse for firing her. I find that her job performance was satisfactory on an objective basis and the discharge seems to me to have been unfair for at least two reasons:

1. The defendants provided no notification at any time that Mrs. Williams was not doing satisfactory work;

12. After 13 years of service, it was unreasonable to discharge Mrs. Williams even if she did fail to give notice of her impending absence.

Beyond that I think there is a serious doubt as to whether she failed to give notice. I am inclined to believe she at least notified her supervisor, Mr. Chisholm, and that he approved her absence in advance. That is all the company's so-called policy required.

However, the question of law before me is not whether the discharge was fair but whether it violated the sections of the statute to which I have referred. I am compelled to conclude that it did not for the following reasons:

1. The evidence simply does not establish that the employer was motivated by an intent to discriminate on account of age.

(a) Exhibit Q, which although it may have some inaccuracies is substantially dependable, establishes that both at the time they were hired and at the present time, the clear majority of employees in the cleaning department were or are over 40 years of age. Some are now in their 60s and have been with the company for many years. On the other hand, the plaintiff herself was only 40 or 41 at the time of her discharge.

(b) The argument that the employer intended to discriminate on account of age in order to reap a financial benefit by substituting an employee at a lower rate of pay and with reduced fringe benefits is not persuasive. In the first place, there is no evidence that plaintiff's alleged replacement, Mr. Corbett, received a lower salary or benefits than did plaintiff. Even the profit sharing plan which was amended downward in terms of benefits was not amended until six months after the alleged replacement was hired.

More to the point, even if the savings which Mrs. Williams alleges that the employer was seeking had been achieved by the employer, they would have been so minimal as to make it incredible that a rational employer would intentionally discriminate on the basis of age to secure such meager savings; that is to say meager in the light of its total operating costs.

2. The plaintiff has failed to establish by a preponderance of the evidence that she was replaced by an employee under 40.

At best the proof concerning her alleged replacement, Mr. Corbett, can be interpreted equally to prove that Mr. Corbett was appointed to succeed Mr. Nurse as to succeed Mrs. Williams. That showing is insufficient to meet the burden of establishing the proposition by a preponderance of the evidence. Morever, although not necessary to my verdict, I note that Mr. Corbett remained with the company only two months or so and there is a question as to whether under such circumstances he can be found to have been a genuine replacement employee.

3. Plaintiff has failed to establish that she mitigated her damages. The evidence of her efforts to secure a job is too sketchy to be meaningful and it is difficult to believe that in the long period since her termination she could not find any employment as a cleaning person, a job which, while indispensable to our society, does not require significant skill.

These remarks constitute my findings of fact and conclusions of law as required under Rule 52 of the Federal Rules of Civil Procedure and as the result of my findings of fact and conclusions of law, the complaint is dismissed.

I want to commend both lawyers for their presentation of the case and I would like to speak to each counsel separately as to my views with regard to things that may be of interest to them.

(Record closed)

(2)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals' affirmance of the District Court's factual finding that the employer did not discharge plaintiff because of her age raises any issue warranting review by this Court?

STATEMENT PURSUANT TO RULE 29.1

Respondents Garban Ltd. and Garvin GuyButler, Inc. are wholly-owned subsidiaries of Mills & Allen International plc, which has its principal place of business in London, England.

Named respondent Garvin Bantel Corp. did not make any appearance in this action. Garvin Bantel Corp. was dissolved prior to the commencement of the action.

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FEDERAL STATUTE INVOLVED

29 U.S.C. § 623(a)
Prohibition of Age Discrimination

(a) Employer practices

It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

After a bench trial, District Judge Morris E. Lasker found that (i) Petitioner had failed to establish a prima facie case under the Age Discrimination in Employment Act

("ADEA"), and (ii) Respondent did not discharge Petitioner on account of her age (Pet. at A-6).

The Court of Appeals for the Second Circuit expressly affirmed the District Court's determination that Petitioner had not established a prima facie case (Pet. at A-2). The Court of Appeals also found "ample support in the record" for the District Court's finding that Petitioner's discharge was not motivated by age discrimination (Id.).

REASONS FOR DENYING THE WRIT

IN AFFIRMING THE DISTRICT COURT'S FINDINGS OF FACT, THE COURT OF APPEALS MERELY APPLIED WELL-SETTLED LAW

A. The Court of Appeals Did Not Apply a "New Interpretation" of the Age Discrimination in Employment Act

Petitioner asserts that the Court of Appeals erred "by requiring that Petitioner prove the Respondent's `intent' to engage in discriminatory conduct" because, she contends, proof of intent "is not requisite to establishing a prima facie case" (Pet. at 6).

The Court of Appeals, however, did not hold that direct proof of "intent" is an "element" of a prima facie case. It simply alluded to the unremarkable -- and correct -- proposition that the ultimate issue in an age discrimination case is whether the employer's action was motivated by age. See 29 U.S.C. § 623(a) (prohibiting discrimination

"because of . . . age"). As this Court held in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981): "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Id. at 253 (emphasis added).

Petitioner argues that because the District Court rejected reasons for her discharge proffered by Respondents, a judgment in her favor was required. This argument was expressly rejected in Burdine:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether

> it discriminated against the plaintiff. . . .
>
> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.

450 U.S. at 254-56 (emphasis added). The District Court and the Court of Appeals correctly applied the foregoing principles and concluded that Petitioner was not discharged because of her age.

B. Petitioner Did Not Establish a Prima Facie Case

Neither the District Court nor the Court of Appeals required Petitioner to produce direct evidence of intent. Rather, the District Court applied the Second Circuit's well-settled, four-part test, requiring the plaintiff to establish that (1) she was within the protected age group; (2) she was

qualified for the job; (3) she was discharged; and (4) the discharge occurred under circumstances giving rise to an inference of age discrimination. Hollander v. American Cyanamid Co., 895 F.2d 80, 83 (2d Cir. 1990).

In his findings of fact and conclusions of law, District Judge Lasker articulated the fourth element of the prima facie case with particular reference to the disputed issues at trial, noting that Petitioner needed to demonstrate that she was replaced by "someone not in the statute's protected class" (Pet. at A-5). Judge Lasker used this formulation because a "replacement" argument was the principal theory that Petitioner herself advanced at trial in an attempt to satisfy the fourth element of the test, i.e., that there be some evidence giving rise to an inference of age discrimination. Judge Lasker

expressly found that Petitioner's evidence was clearly inadequate to meet the fourth element (Pet. at A-6 to A-7).

Petitioner now suggests that her inability to establish a prima facie case was due to Judge Lasker's articulation of the fourth element (Pet. at A-6). It has long been understood that presentation of the elements of a prima facie case of discrimination may vary with the factual situation. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973); United States Postal Service v. Aikens, 460 U.S. 711, 715 (1983). Moreover, Judge Lasker's formulation of the fourth element has been repeatedly recognized as the most appropriate articulation for age discrimination cases. Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 69 (6th Cir. 1982); Hill v. Department of the Air Force, 796 F.2d 1469, 1472 (Fed.

Cir. 1986) (Newman, J., concurring); Moody v. Pepsi-Cola Metropolitan Bottling Co., 915 F.2d 201, 208 (6th Cir. 1990).

Finally, the record makes clear that had Judge Lasker chosen to articulate the fourth element in a different manner, the evidence in this case was patently insufficient to establish that "the discharge occurred under circumstances giving rise to an inference of age discrimination." Hollander, supra, 895 F.2d at 83. As Judge Lasker found, "at the time they were hired and at the present time, the clear majority of employees in [Petitioner's] department were or are over 40 years of age. Some are now in their 60's and have been with the company for many years. On the other hand, the plaintiff herself was only 40-41 at the time of her

discharge." (Pet. at A-6). Additionally, Judge Lasker found "incredible" Petitioner's theory that Respondents discriminated against her for financial reward; the findings made clear that Petitioner's discharge was in no way financially beneficial for Respondents (Id.). Petitioner did not contest these findings in the Court of Appeals, and does not contest them now. The circumstances surrounding Petitioner's discharge simply do not give rise to an inference of age discrimination.

C. The ADEA Does Not Prohibit Discharge Based on "Personal Dislike"

While Petitioner relies on Judge Lasker's finding that "personal dislike" was the "true reason" for Petitioner's discharge, she simultaneously asks this Court to reject Judge Lasker's accompanying finding that this "true

reason" was simply not a pretext for age discrimination.

Courts have long recognized that the ADEA "`does not cast upon the court the duty of determining that a discharge was, for reasons other than age, a justifiable discharge. It serves only to prevent discharge because of age alone.'" Reich v. New York Hospital, 513 F. Supp. 854, 863 (S.D.N.Y. 1981) (quoting Brennan v. Reynolds & Co., 367 F. Supp. 440, 444 (N.D. Ill. 1973)); Parcinski v. Outlet Co., 673 F.2d 34, 36 (2d Cir. 1982), cert. denied, 459 U.S. 1103 (1983).

Petitioner incorrectly asserts that a discharge stemming from "personal dislike" violates the ADEA. As Judge Lasker stated in his findings of fact and conclusions of law, a violation of the ADEA requires Petitioner to prove that her discharge was the result of

discrimination on the basis of age; an accusation that the discharge was unfair is not sufficient.

CONCLUSION

The Petition for a Writ of Certiorari merely challenges the fact-findings of the courts below. Those courts simply applied well-settled law in finding that the evidence was woefully insufficient to prove age discrimination.

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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